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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 557

RAILWAY EXPRESS AGENCY, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

and

UNITED PARCEL SERVICE, INC.,
Intervening-Defendant-Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL FOR NON-PROSECUTION UNDER RULE 14(2) OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

R. J. FLETCHER,
R. E. JOHNSON,
JAMES V. LIONE,
Counsel for Plaintiff-Appellant,
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219 East 42nd Street,
New York 17, New York.

FULMER LONG,
WILLIAM H. MARX,
Of Counsel.

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No Motion to Dismiss the Appeal was made below.

Statement as to the Motion.

The notice of appeal was filed August 15, 1957. The record upon which the appeal is taken was forwarded to the Clerk of the Supreme Court of the United States September 27, 1957. On October 8, 1957 there were for-

warded to the Clerk of the Supreme Court of the United States (1) 40 copies of appellant's Statement as to Jurisdiction; (2) original appearances on behalf of attorneys R. J. Fletcher, James V. Lione and R. E. Johnson; (3) certificate of service of the said Statement as to Jurisdiction executed by James V. Lione.

On October 9, 1957, Fulmer Long, attorney having the principal responsibility for the appeal on behalf of appellant, went to Chicago in connection with a case pending in the United States Circuit Court of Appeals for the Seventh Circuit and from there said Fulmer Long went on his annual leave (see affidavit of Fulmer Long appended hereto).

On October 9 the Clerk of the Supreme Court of the United States wrote R. J. Fletcher, Vice President and General Counsel of appellant advising:

> "Your letter of October 8, together with the items listed therein, has been received. Before the above case can be docketed, this office must receive your check for $100.00, payable to 'Clerk, U. S. Supreme Court', to cover the docketing fee."

The Clerk's letter of October 9, 1957 arrived at the office of R. J. Fletcher October 11, but in the absence of the attorney having primary responsibility for the case, the importance thereof was overlooked and docketing fee was not paid until October 17 when the case was docketed, three days subsequent to the expiration of the sixty day period for docketing.

ARGUMENT.

The inadvertent three day delay in payment of the docket fee does not preclude jurisdiction.

Appellant has been diligent in prosecuting the appeal. The only lapse has been the unintentional and inadvertent three day delay in the payment of the docket fee. Rule 14(2) of the Revised Rules of the Supreme Court of the United States is discretionary. In fact, as the Supreme Court said in *United Public Workers* v. *Mitchell*, 330 U. S. 75 at 85:

> "Even after dismissal for failure to docket the rule permits this Court to allow the appellant to docket."

The issues in the appeal are important to the public and the transportation industry. The adjudication thereof, should not be precluded by a procedural technicality.

The payment of the docket fee on October 17 rather than on October 14 does not broaden the appeal or change the issues raised therein or adversely affect the appellees.

As set forth at pages 18 and 19 of the appellant's Statement as to Jurisdiction the issues are important to the transportation industry and to the proper administration of Part II of the Interstate Commerce Act. It is earnestly urged that in the interest of justice the issues be resolved in this litigation. Compare *Georgia Lumber Co.* v. *Compania*, 323 U. S. 834, 336.

Conclusion.

Wherefore, it is respectfully prayed that the motion to dismiss made by intervening defendant appellee under Rule 14(2) of the Revised Rules of the Supreme Court of the United States be denied, and that such further relief be granted appellant as appears appropriate.

Respectfully submitted,

R. J. Fletcher,
R. E. Johnson,
James V. Lione,
Counsel for Plaintiff-Appellant.

Fulmer Long,
William H. Marx,
Of Counsel.

APPENDIX.

Affidavit of Fulmer Long.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:
CITY OF NEW YORK

FULMER LONG, being duly sworn, deposes and says:

1. That he is the General Solicitor of plaintiff-appellant, Railway Express Agency, Incorporated, in case having Docket No. 557, October Term 1957, and is primarily responsible for the appeal in said case.

2. That he is informed by the Office of the Clerk of the United States District Court for the Southern District of New York that the record upon which the appeal was taken was forwarded to the Clerk of the Supreme Court of the United States September 27, 1957.

3. That on October 8, 1957, deponent caused to be forwarded to the Clerk of the Supreme Court of the United States (1) 40 copies of appellant's Statement as to Jurisdiction; (2) original appearances on behalf of attorneys R. J. Fletcher, James V. Lione and R. E. Johnson; (3) certificate of service of the said Statement as to Jurisdiction executed by James V. Lione.

4. That on October 9, 1957, deponent went to Chicago, Illinois in connection with a case pending in the United States Circuit Court of Appeals for the Seventh Circuit and thence went on his annual leave from which he returned to his office October 25, 1957 upon receipt of information that (1) he had overlooked the payment of the docket fee, (2) the Clerk of the Supreme Court of the United States had on October 9, 1957 addressed a letter to R. J. Fletcher, Vice President and General Counsel of appellant, advising

of the need of the payment of the docket fee, (3) the importance of the letter had been overlooked, (4) the docket fee was paid October 17, 1957, (5) the case was docketed October 17, 1957, and (6) motion dated October 16, 1957 had been made to dismiss the appeal for non-prosecution because of failure to docket.

Deponent believes that appellant has a good and meritorious case on appeal and that the issues are of sufficient importance to the public to warrant a final determination on the merits.

FULMER LONG.

Sworn to before me this 30th day of October, 1957.

MARCUS M. CURRY
NOTARY PUBLIC, State of New York
No. 60-0830250
Qualified in Westchester County
Term Expires March 30, 1959